Supreme Court, U. S.
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MICHAEL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-305

UNITED STATES OF AMERICA,

Petitioner,

vs.

J. LEE HAVENS

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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INDEX.

	PAGE
I. Statement	1
II. Argument	5
Conclusion	7
Appendix (Extension of Time to File Brief)	A1

CITATIONS.

Agnello v. United States, 269 U. S. 20 (1925)	5
Harris v. New York, 401 U. S. 222 (1971)	4, 6
Miranda v. Arizona, 384 U. S. 436 (1966)	6
Oregon v. Hass, 420 U. S. 714 (1975)	4, 6
United States v. Mariani, 539 F. 2d 915 (1976)	5
United States v. Trejo, 501 F. 2d 138 (1974)	5
United States Constitution:	
Fourth Amendment	2, 3, 5, 6, 7
Sixth Amendment	2

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I.

STATEMENT.

Pages 2 and 3 of the government's petition filed in this court summarize the arrest of respondent Havens and government witness McLeroth, as well as the result of Havens' trial and sentencing.[1] The Court of Appeals for the Fifth Circuit reversed Havens' conviction and ordered a new trial because of the improper admission in evidence of items which had been suppressed as evidence prior to trial, the items in question having been illegally seized by government agents in violation of Havens'

1. McLeroth, who was charged with the same offenses as respondent Havens, had two counts against him dismissed on motion of the government, and he received a sentence of five years probation for importation of cocaine.

rights under the Fourth Amendment to the United States Constitution.[2] The statement by the government concerning the suppressed evidence, however, requires amplification.

Government witness McLeroth, who had made numerous trips to South America over a period of several years (Tr. 68)[3], made three trips to Peru in the company of Havens during 1977: once in April and twice in September (Tr. 82-117).

McLeroth testified that on the April trip[4], with Havens' help, he had smuggled a substantial quantity of cocaine into the United States. He said that the cocaine was placed about his body and that Havens helped wrap his body with ace bandages and tape to hold the cocaine securely in place (Tr. 89-90).

McLeroth then testified that an improved technique was developed whereby a pocketed shirt was used and the wrapping of his body with tape and bandages was abandoned (Tr. 112).

He testified that prior to their first trip in September, Havens had given him a T-shirt with pockets sewn on it for the purpose of smuggling cocaine (Tr. 111-112) and that he wore the shirt to Peru on that first trip early in September. He said that no cocaine was available, necessitating a second trip, later in the month (Tr. 116-117). At the conclusion of this late September trip McLeroth was arrested wearing the pocketed shirt filled with thirteen packages of cocaine (Tr. 14-25). Havens

2. On appeal Havens also raised two issues which were not ruled upon by the Court of Appeals in the apparent belief that its decision made moot the questions raised. One issue was prosecutorial misconduct during trial, and the other issue was the denial of right to counsel in violation of Haven's rights under the Sixth Amendment to the United States Constitution (see footnote 4 of the court's opinion, Appendix A, page 2a of the government's petition).

3. "Tr." refers to the transcript of the proceedings at trial. "Supp. Tr." refers to Supplement to Trial Proceedings, Closing Argument of Counsel.

4. This trip in April, 1977 was Havens' first trip to South America (Tr. 346).

was arrested a few hours later, while awaiting departure by domestic air carrier to his home in Indiana.[5]

In Havens' luggage T-shirts were found. They were not Havens' size, and they had been cut up in a manner suggesting, according to the government, that portions of them had been used to make the pockets for the shirt McLeroth had used to smuggle cocaine (Supp. Tr. 12-13). The government advanced no theory to explain why Havens was returning from South America with remnants of a shirt manufacturing process allegedly completed weeks earlier in Indiana, prior to a previous trip.

Notwithstanding the fact that the shirts in Havens' luggage had been properly suppressed as evidence prior to trial, the government undertook to introduce them in evidence.

Because respondent offered no testimony on direct examination concerning the contents of his luggage, and offered no testimony about T-shirts, the government attempted to create, solely through cross examination, a conflict in testimony through which the introduction of the T-shirts could be justified on the ground of impeachment. Accordingly, the prosecutor handed the suppressed evidence to Havens, in the presence of the jury, and inquired if his luggage had contained the shirts on the day of Havens' arrest. Havens testified that he had no knowledge of the T-shirts being in his luggage until the following day, when the luggage contents were inventoried in his presence at DEA headquarters (Tr. 405-407). Havens testified that he told the DEA agent at that time that the shirts were not his size, but were probably McLeroth's size, saying "He is somewhat smaller than I." (Tr. 405-406).[6]

5. Havens' luggage was seized, without a warrant, from the baggage compartment of the domestic air carrier he was planning to board. Prior to trial the court held the seizure to be unlawful, and the contents of Havens' luggage were ruled suppressed as evidence. (Motion to Suppress Hearing, January 18, 1978.)

6. It should be noted that no waiver is involved, as defense counsel made appropriate protest against the actions of the prosecution detailed herein (Tr. 397-398).

A DEA agent then testified in rebuttal that he had made Havens aware that the cut up T-shirts were in his luggage on the day of his arrest, not on the following day (Tr. 438-441). The trial judge thereupon permitted the shirts to be introduced in evidence, vigorously used by the government in final argument, and to be taken into the jury room during deliberations (Tr. 441, Supp. Tr. 12-13).[7]

The trial judge permitted this in the erroneous belief that it was permitted under recent decisions of the Supreme Court, notably *Harris* v. *New York*, 401 U. S. 222 (1971) and *Oregon* v. *Hass*, 420 U. S. 714 (1975) (note comments of the court at Tr. 393-395).

On appeal the government also argued unsuccessfully that a portion of Havens' testimony on direct examination was sufficient to permit the introduction of the T-shirts in evidence for purposes of impeachment. The relevant testimony by Havens is set forth at page 4 of the government's petition. The testimony concerns the final trip Havens and McLeroth made in late September, 1977, which trip led to their arrest.[8] It should be noted that this testimony is not contradicted by the government. On the contrary, as discussed above, the government contended that the wrapping and taping was discontinued after the first trip in April, when the pocketed shirt was substituted for use in later trips.

In any event, it is abundantly clear that no direct testimony of any kind was offered concerning the suppressed evidence, and

7. During final argument, the prosecutor said to the jury, "Now, the government's going to ask you when you take back all of the evidence to take the two T-shirts, size 38, size 40, and compare them with Government's Exhibit 3." (Supp. Tr. 12-13).

Note: Exhibit 3 includes the pocketed T-shirt used by McLeroth to smuggle cocaine (Tr. 23).

8. The questioning refers to the "fourth trip" to Lima Peru. It was Havens fourth trip, and the third trip in McLeroths company. Havens testified that he made a trip alone in the summer of 1977 to further a medical equipment supply business he was attempting to establish (Tr. 352-353).

the only conflict on cross examination was whether Havens was made aware of the suppressed evidence on the day of his arrest or on the following day.

II.

ARGUMENT.

The opinion in this case by the Court of Appeals for the Fifth Circuit is set forth in Appendix A of the government's petition.[9] That opinion was based principally on *Agnello* v. *United States*, 269 U. S. 20 (1925). Quite simply, *Agnello* held that suppressed evidence cannot be used to rebut cross examination testimony, where no direct testimony about the suppressed evidence was introduced. Cases following *Agnello* are both numerous and consistent in the application of this rule.[10]

The government, however, seeks to have *Agnello* overruled.[11] It seeks the power, on cross examination, to confront a defendant with suppressed evidence which was not the subject of testimony on direct examination, and to interrogate him about that evidence under cover of impeachment. Regarding this, the Court of Appeals said in the present case,

> "According to the view of the trial judge and the prosecutor, defendant could be asked on cross-examination a question, which answered affirmatively would admit the incriminating tendencies of the illegal evidence, and, answered negatively would allow the subsequent introduction of the illegal evidence for purposes of impeachment."[12]

If the government's view in this case were to prevail, the deterrent to violation of Fourth Amendment rights would cease

9. Citations to particular portions of the Court of Appeals opinion will refer to pages in Appendix A of the government's petition.

10. *United States* v. *Mariani*, 539 F. 2d 915 (2d Cir. 1976) *United States* v. *Trejo*, 501 F. 2d 138 (9th Cir. 1974).

11. Page 17, government petition.

12. Page 8a, Appendix A.

to exist. Illegally obtained evidence might not be used in the government's case in chief, but the effect of such evidence would be equally damaging if routinely introduced by the prosecution during cross-examination.

Alternatively, the government seeks a review of this case for the Court to decide "to what extent it [*Agnello*] should be limited in light of *Harris* and *Hass*."[13]

It is submitted that *Harris* v. *New York, supra* and *Oregon* v. *Hass, supra* are not inconsistent with *Agnello,* and further, that the limitations contained therein are clearly stated. Both *Harris* and *Hass* dealt with incriminating statements given to police officers. The statement were inadmissable at trial because of "Miranda"[14] violations. In both cases statements were made on direct examination which contradicted the prior, inadmissable statements. In each case the use of the prior, inconsistent statement was permitted for purposes of impeachment.

It is clear that these cases have no application to the case at hand. In this case, at the time of Havens' arrest and at all times thereafter, including trial, he represented himself to be solely engaged in legitimate business. No prior, inconsistent statements are involved as in *Harris* and *Hass*. Absolutely no testimony was offered on direct examination regarding the suppressed material. Moreover, by the government's own account, there was no draping and taping of McLeroth's body on the "fourth trip". Where then, is the false testimony which the government seeks to impeach? The answer is obvious. There is none.

13. Page 17, government's petition.
14. *Miranda* v. *Arizona,* 384 U. S. 436 (1966).

CONCLUSION.

The government must not be permitted, in the guise of truth seeking, to subvert and ultimately destroy the Fourth Amendment to the United States Constitution. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent.

APPENDIX.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
Washington, D. C. 20543

September 12, 1979

J. Lee Havens, Esq.
6410 Sharon Drive
Fort Wayne, Indiana 46825

Re: United States v. J. Lee Havens
No. 79-305

Dear Mr. Havens:

Your request of September 11, 1979, for an extension of time within which to file a response to the petition for a writ of certiorari in the above-entitled case is granted and the time has been extended to and including October 29, 1979.

No further extension will be granted by the Clerk to file this brief.

Very truly yours,

/s/ Michael Rodak, Jr.
Michael Rodak, Jr.
Clerk

cc: The Hon. Wade H. McCree, Jr.
Solicitor General of the U. S.
Department of Justice
Washington, D. C. 20530

AIR MAIL